(4)

No. 09-402

Supreme Court, U.S.
FILED
MAR 24 2010
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

MARKICE LAVERT McCANE, *Petitioner*,

v.

UNITED STATES

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on March 1, 2010, and (2) granting the petition. The grounds supporting this motion are the following:

(1) THE DENIAL OF REHEARING IN UNITED STATES V. GONZALEZ

On March 16, 2010, the primary basis articulated in the BIO for denying the petition was eliminated. The BIO argued that review would be "premature at the present time" because the Government's petition for rehearing was still pending in *United States v. Gonzalez*, 578 F.3d 1130 (9th Cir 2009). *See* BIO at 6. The BIO explained:

> In the government's view, the Court's plenary review is unwarranted at the present time because that newly developed conflict may be eliminated by the court of appeals on rehearing.
>
> The government filed a petition for rehearing en banc in *Gonzalez*, the Ninth Circuit called for a response, and the petition and opposition are currently pending before the court of appeals. If the Ninth Circuit grants either panel or en banc rehearing and aligns itself with the Tenth Circuit, its decision will eliminate the current conflict on the question presented in this petition.

BIO at 6.

On March 16, the Ninth Circuit eliminated this argument by denying the petition for panel rehearing and rehearing en banc. *See United States v. Gonzalez*, --- F.3d ----, 2010 WL 917204 (9th Cir 2010) ("The petition for rehearing and the petition for rehearing en banc are DENIED.").

Judge Betty Fletcher authored an extensive opinion concurring in the denial that explained why "the panel's decision is compelled by the Supreme Court's retroactivity precedents and dictated by *Gant*." *Id.* at *6. Judge Bea filed a lengthy dissenting opinion, joined by six other judges, that recognized that the denial of the petition for rehearing "set the stage" for Supreme Court review:

> If there is a silver lining to the panel's decision to flout Supreme Court case law in *Herring* and *Krull*, it is that the panel has set the stage for the Supreme Court to review the scope of the exclusionary rule in light of the circuit split we have now created. The panel's opinion reaches a conclusion directly contrary to that of *McCane*, 573 F.3d 1037, which held the good faith exception applies to searches held unconstitutional in *Gant*.

Id. at *9.

The stage has now been set. The barrier to review articulated in the BIO has now been erased. Further, as far as counsel is aware, no other petition has yet been filed before this Court that raises the pressing issues articulated in this petition. Petitions for rehearing are rarely granted. But this is one of those rare cases in which it is warranted. Revisiting the denial of the petition for certiorari provides the best opportunity for this Court to review this pressing and important question of federal constitutional law.

(2) THE ELEVENTH CIRCUIT'S DECISION IN UNITED STATES V. DAVIS

On March 11, 2010, the Eleventh Circuit further deepened the circuit split by handing down *United States v. Davis*, -- F.3d --, 2010 WL 810984 (11th Cir. 2010). Like *McCane* and *Gonzalez*, *Davis* asks whether the good faith exception applies to a pre-*Gant* search invalidated by *Gant*. In an opinion by Judge Kravitch, joined by Judges Barkett and Tjoflat, the Eleventh Circuit recognized the clear circuit split and then agreed that a good-faith exception should apply in such circumstances:

> We are not the first court of appeals to consider this question, but the other circuits have split on the issue. In the aftermath of *Gant*, the Ninth and Tenth Circuits have reached opposite conclusions as to the exclusionary rule's application in cases like this one. *Compare United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009) (applying the exclusionary rule to a pre-*Gant* search), *with United States v. McCane*, 573 F.3d 1037 (10th Cir.2009) (relying on the rule's good-faith exception and refusing to require the suppression of evidence), *cert. denied*, No. 09-402, 2010 WL 680526, --- U.S. ----, --- S.Ct. ----, --- L.Ed.2d ---- (Mar. 1, 2010). Similarly, before *Gant*, the Fifth Circuit refused to apply the exclusionary rule when police had relied in good faith on prior

> circuit precedent, *United States v. Jackson*, 825 F.2d 853, 866 (5th Cir.1987) (*en banc*), but the Seventh Circuit expressed skepticism about applying the rule's good-faith exception when police had relied solely on caselaw in conducting a search, *United States v. 15324 County Highway E.*, 332 F.3d 1070, 1076 (7th Cir.2003). We now enter the fray and hold that the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overturned.

Id. at *3.

Notably, however, the Eleventh Circuit expressly limited the good-faith exception to reliance on "unequivocal" precedent. *See id.* at *6 ("We stress, however, that our precedent on a given point must be unequivocal before we will suspend the exclusionary rule's operation."). This limitation appears to make the Eleventh Circuit's version of the good-faith exception somewhat different from the standard adopted by other courts. The Fifth Circuit's good faith reliance exception contains no such limitation, *see United States v. Jackson*, 825 F.2d 853, 866 (5th Cir. 1987) (en banc), and the Tenth Circuit in the decision below referred to merely "settled" law of a court of appeals, 573 F.3d at 1044.

This limitation also renders the Eleventh Circuit's version of the good-faith exception quite different from the qualified immunity standard that applies in the civil context, even though this Court has instructed that the standard of the good-faith exception and the standard of qualified immunity are the same when they each apply. *See Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004). Qualified immunity attaches unless it is "clearly established" that the conduct was unlawful. *Id.* at 563. The issue is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* The Eleventh Circuit's formulation of the good-faith exception flips that standard on its head. Under the Eleventh Circuit's decision, the good-faith exception does not apply unless it is clearly established that the conduct was *lawful*. Thus, in the qualified immunity context, ambiguity means the government wins; in the good-faith context, the same ambiguity means the government loses. The Eleventh Circuit's limitation seems hard to square with this Court's insistence that qualified immunity and the good-faith exception apply the same test.

(3) THE UTAH SUPREME COURT'S OPINION IN STATE V. BAKER

On March 12, 2010, the Utah Supreme Court became the first state Supreme Court to address the circuit split in *State v. Baker*, --- P.3d ----, 2010 WL 84127 (Utah 2010). The Utah Supreme Court joined the Eleventh Circuit the day before in *Davis* by recognizing a good faith exception in these

circumstances. *See id.* at *11. Like the Eleventh Circuit in *Davis*, the Utah court limited the good-faith exception to instances in which the caselaw is unambiguous. *See id.* ("If the case law had been ambiguous prior to the time the officers conducted a search later definitively declared unconstitutional, the good-faith exception would not apply and the evidence would be excluded.").

The decisions in *Gonzalez*, *Davis* and *Baker* should assuage any objections that granting the petition for certiorari would be premature. In just three weeks since the denial of the petition, two circuit courts and one state supreme court have handed down three decisions addressing the wisdom of a good-faith exception for changing law. These three new decisions address any concerns that the clear circuit split might be overturned en banc or that additional percolation could be helpful.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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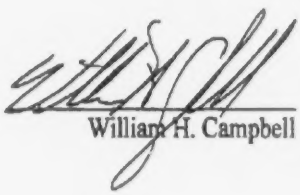
March 23, 2010

RULE 44.2 CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds as specified in Rule 44.2, specifically, "intervening circumstances of a substantial . . effect."



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